(6)

CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 97

JOSEPHINE STIPCICH

vs.

METROPOLITAN LIFE INSURANCE COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED JULY 22, 1928

(22,100)

(32,100)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 533

JOSEPHINE STIPCICH

vs.

METROPOLITAN LIFE INSURANCE COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 11, 1927.

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 4764

JOSEPHINE STIPCICH, Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, Defendant in Error

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit Certifying a Certain Question or Proposition of Law to the Supreme Court of the United State under Section 239 of the Judicial Code

Before Gilbert, Hunt, and Rudkin, Circuit Judges

STATEMENT OF FACTS

This was an action on a policy of insurance on the life of one Anton Stipcich, loss, if any, payable to his wife.

On February 17, 1924, the insured made application in writing to the Metropolitan Life Insurance Company for a policy of insurance on his life. The written application signed by the applicant was divided into two parts, designated as parts A and B, and contained the following provisions, among others:

"It is understood and agreed:

"1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued.

[fol. 2] "2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company: (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder.

"3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application.

"4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant."

The policy was issued pursuant to this written application on March 26, 1924.

Sections 6426 and 6455 of the Laws of Oregon provide:

"Section 6426. (1) Standard Provisions Required. From and after the first day of January next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions: * * *

"(c) A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non payment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

"Section 6455. Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and

all provisions in the application and policy to the contrary are void and of no effect whatever."

[fol. 3] In his application for insurance the applicant stated that he had been operated on for a duodenal ulcer in January, 1922, but had recovered therefrom. On the day of the application and before the application was made he consulted a physician at Astoria, Oregon, for some stomach trouble and was given a prescription. This fact was not disclosed in the application. A few days later he again consulted he same physician and was advised that an X ray should be taken. On March 7 or 8, he consulted a physician in Portland, Oregon, and was sent to the hospital for observation where he remained for several days. During that period the physician made a careful examination and diagnosis of his condition and informed him that in his opinion he had a duodenal ulcer and advised surgical interference. About March 20, he consulted and was examined by a third physician at Portland, Oregon, with the like result, and the same advice was given.

All this occurred before the policy of insurance was issued or delivered. Soon thereafter an operation was performed, as recommended, and the insured died as a result of the operation. It appeared, without contradiction, from the testimony introduced at the trial that between the date of the application for the insurance and the date of the issuance and delivery of the policy there was such a change in the health or condition of the insured as would materially increase the risk or hazard, and that no notice of this change of health or condition and increase of risk or hazard was given or brought home to the insurance company prior to the issuance and delivery of the policy, but while the widow of the insured was on the stand as a witness on the trial in the court below the following offer of proof was made in her behalf:

"That if the witness were permitted to answer the question propounded and such questions as would properly bring this matter out, she would testify as follows: that after her husband, Anton Stupcich, had been examined and X ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Collette, [fol. 4] agent of the defendant, and told him, in the presence

of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at the time Mr. Julien Coblentz was agent for the defendant company."

The Julien Coblentz referred to in the above offer of proof was the agent of the Metropolitan Life Insurance Company who solicited and procured the application for the insurance, and the Dr. Sommer therein referred to was one of the Doctors consulted by the insured at Portland, Oregon. The court below sustained an objection to this offer of proof and an exception was duly taken and allowed. At the close of the testimony the court directed a verdict in favor of the defendant.

Question Certified

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is

Was it competent to prove by parol testimony that the agent who solicited and procured the application for the insurance in behalf of the insurance company was informed and had notice of the change in the health and condition of the insured and of the increase in the risk and hazard after the written application for the policy was made and before the policy was issued and delivered, as set forth in the above offer of proof, for the purpose of establishing a waiver or creating an estoppel, in view of the stipulations contained in the application for the insurance and more especially of the stipulation

"That any statement made to or by, or any knowledge of the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application."

Wm. R. Gilbert, William H. Hunt, Fr. H. Rudkin,
United States Circuit Judges.

[fol. 5] (Endorsed:) Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying a certain question or proposition of law to the Supreme Court of the United States under Section 239 of the Judicial Code. Filed July 17, 1926. F. D. Monckton, Clerk, by Frank H. Schmid, Deputy Clerk.

A true copy.
Attest July 19, 1926.
F. D. Monckton, Clerk, by Frank H. Schmid, Deputy Clerk. (Seal United States Circuit Court of Appeals, Ninth Circuit.)

[fol. 6] (Endorsed:) No. 4764. United States Circuit Court of Appeals for the Ninth Circuit. Josephine Stipcich, plaintiff in error, vs. Metropolitan Life Insurance Company, a corporation, defendant in error. Certified copy of certificate certifying certain question or proposition of law to the Supreme Court of the U. S.

Endorsed on cover: File No. 32,100. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 533. Josephine Stipcich vs. Metropolitan Life Insurance Company. (Certificate.) Filed July 28th, 1926. File No. 32,100.

DENIED Oct 11 1926

FILED
SEP 7 1926
WM. R. STANSBURY
CLERK

No. [redacted] 97.

IN THE

SUPREME COURT

OF THE

UNITED STATES

JOSEPHINE STIPCICH,
Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation, Respondent.

PETITION FOR CERTIORARI OR RULE TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT. UNDER SUBDIVISION 3. RULE, 34, OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

G.C. FULTON, Astoria, Oregon, Attorney for Petitioner.
WOOD, MONTAGUE & MATTHEISSEN, Portland, Oregon, Attorneys for Respondent.

Filed this ..... day of A.D.1926

.....
Clerk

IN THE
SUPREME COURT
OF THE
UNITED STATES

No. 533

OCTOBER TERM, A. D. 1926

JOSEPHINE STIPCICH,
Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation, Respondent.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petition of Josephine Stipcich respectfully shows to this Honorable Court as follows:

That on March 26, 1924, the Metropolitan Life Insurance Company executed and delivered in Oregon to Anton Stipcich, a citizen of Oregon, its life policy wherein it covenanted to pay to him in consideration of the faithful performance by him of the covenants and conditions therein contained, on his part to be done and performed, on March 24, 1944, if alive; if not, upon due proof of his death, at any time prior thereto, to his wife, Josephine Stipcich, petitioner herein, the sum of $4,000 less any indebtedness or unpaid premiums, etc.

Thereafter, and on April 8, 1924, said Anton Stipcich, as the result of a surgical operation, died.

On April 22, 1924, petitioner made due proof of such death, which was received by the insurance company, but payment of the policy was refused.

Petitioner brought this action to recover on such policy.

The action was brought in the Circuit Court of the State of Oregon, for Clatsop County, on January 19, 1925.

By timely proceedings, and upon grounds of diverse citizenship, the cause was properly removed to the United States District Court for the District of Oregon. The cause was tried to the court and a jury and the trial concluded July 28, 1925.

At the conclusion of taking of the testimony, and after each party had rested, at the request of counsel for defendant Metropolitan Life Insurance Company, the court instructed the jury to return a verdict in favor of such defendant, which was accordingly done, and judgment was on said date entered thereon, and the action dismissed.

Upon the pleadings and a bill of exceptions duly settled and allowed, the case was by writ of error taken to the Circuit Court of Appeals for the Ninth Circuit.

After full hearing had before said Circuit Court of Appeals, under the provisions of Selection 239 of the Judicial Code as amended by the Act of February 15, 1925, that court on July 17, 1925, made certificate to this Court, as follows:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPHINE STIPCICH,
Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,
Defendant in Error.

No. 4764

CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, CERTIFYING A CERTAIN QUESTION OR PROPOSITION OF LAW TO THE SUPREME COURT OF THE UNITED STATES UNDER SECTION 239 OF THE JUDICIAL CODE.

Before GILBERT, HUNT, and RUDKIN, Circuit Judges.

This was an action on a policy of insurance on the life of one Anton Stipcich, loss, if any, payable to his wife.

On February 17, 1924, the insured made application in writing to the Metropolitan Life Insurance Company for a policy of insurance on his life. The written application signed by the applicant was divided into two parts, designated as parts A and B, and contained the following provisions, among others:

"IT IS UNDERSTOOD AND AGREED:

"1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued.

"2. That no agent, medical examiner, or any other person except the Officers of the Home Office of the Company, have power on behalf of the Company; (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder.

"3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application.

"4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant."

The policy was issued pursuant to this written application on March 26, 1924.

Sections 6426 and 6435 of the Laws of Oregon provide:

"Section 6426. (1) Standard Provisions Required. From and after the first day of Jan-

uary next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions: * * *

"(c). A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for nonpayment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

"Section 6435. Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

In his application for insurance the applicant stated that he had been operated on for a duodenal ulcer in January, 1922, but had recovered therefrom. On the day of the application and before the application was made he consulted a physician

at Astoria, Oregon, for some stomach trouble and was given a prescription. This fact was not disclosed in the application. A few days later he again consulted the same physician and was advised that an X-ray should be taken. On March 7 or 8, he consulted a physician in Portland, Oregon, and was sent to the hospital for observation where he remained for several days During that period the physician made a careful examination and diagnosis of his condition and informed him that in his opinion he had a duodenal ulcer and advised surgical interference. About March 20, he consulted and was examined by a third physician at Portland, Oregon, with the like result, and the same advice was given.

All this occurred before the policy of insurance was issued or delivered. Soon thereafter an operation was performed, as recommended, and the insured died as a result of the operation. It appeared, without contradiction, from the testimony introduced at the trial that between the date of the application for the insurance and the date of the issuance and delivery of the policy there was such a change in the health or condition of the insured as would materially increase the risk or hazard, and that no notice of this change of health or condition and increase of risk or hazard was given or brought home to the insurance company prior to the issuance and delivery of the policy, but while the widow of the insured was on the stand as a witness on the trial in the court below the following offer of proof was made in her behalf:

"That if the witness were permitted to an-

swer the question propounded and such questions as would properly bring this matter out, she would testify as follows: that after her husband, Anton Stipcich, had been examined and the X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time Mr. Julien Cublentz was agent for the defendant company."

The Julien Coblentz referred to in the above offer of proof was the agent of the Metropolitan Life Insurance Company who solicited and procured the application for the insurance, and the Dr. Sommer therein referred to was one of the Doctors consulted by the insured at Portland, Oregon. The court below sustained an objection to this offer of proof and an exception was duly taken and allowed. At the close of the testimony the court directed a verdict in favor of the defendant.

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is:

Was it competent to prove by parol testimony that the agent who solicited and procured the application for the insurance in behalf of the insurance company was informed and had notice of the change in the health and condition of the insured and of the increase in the risk and hazard after the written application for the policy was made and before the policy was issued and delivered

as set forth in the above offer of proof, for the purpose of establishing a waiver or creating an estoppel, in view of the stipulations contained in the application for the insurance and more especially of the stipulation:

> "That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application."

WM. B. GILBERT,
WILLIAM H. HUNT,
FK. H. RUDKIN.
United States Circuit Judges.

The said certificate has been seasonably filed in this Court and the cause placed upon the docket of this Court, as No. 533 of the October term, 1926, and is now pending before this Court.

Petitioner now makes application to this Court for a writ of certiorari or rule of this Court accordingly as the practice of this Court may obtain in such regard, directing and requiring that the entire record in this case be sent up and certified to this Court, accordingly as provided by Section 239 of the Judicial Code as amended by the act of February 13, 1925, and Rule No. 34 of the revised rules of this Court so that this Court may consider and decide the whole matter in controversy as upon a writ of error or appeal.

That accompanying this petition is a duly certified copy of the entire record of this cave in said Circuit Court of Appeals for the Ninth Circuit, in-

cluding the proceeding had before such Court in this case, which certified copy is now on file with the Clerk of this Court, and is hereby referred to and made a part of this petition and application. The said certified copy of the entire record includes the bill of exceptions, shown on pages 72 to 126, both inclusive; also, the assignments of error that were filed by your petitioner, shown on pages 64 to 69, both inclusive, all of which is hereby referred to and made a part of this petition and application.

Petitioner is advised and believes, and accordingly alleges, that there are special reasons for requiring the entire record in this case to be certified to this Court, and for this Court to consider and decide the whole matter in controversy, pursuant to the provisions of Section 239 of the judiciary act as amended, and No. 34 of the revised rules of this Court.

GROUNDS AND GRAVAMEN OF AND FOR THIS PETITION AND APPLICATION.

(A) **The Pleadings.** In her complaint, which was in accordance with the usual form, and as to which no question is made, petitioner set forth a copy of the life policy sued upon. A copy of this policy is found at pages 8 to 39, both inclusive, of the certified copy of the record filed with petition, which is hereby, referred to and made a part of this petition.

This policy contains the following provisions found on page 28 of such certified copy of the record, namely:

> "That the company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the company, **during the lifetime of the applicants.**"

This policy contains the further provision found on page 38 of the certified copy of the record, namely:

> "This policy shall not take effect unless and until the full premium has been actually paid in cash."

To this complaint the Metropolitan Life Insurance Company made answer, in which it admitted the payment of the premium on March 19, 1924, and issuance of the policy of date March 26, 1924. The defendant, however, made the contention, among others not material for any purpose, that between the date of the application of the insured, February 18, 1924, and the date of the issuance of the policy, the health condition of the insured had materially changed, materially increasing the risk assumed, which was not disclosed to it by the insured, and by it wholly unknown, otherwise it would not have issued the policy.

(B) The Trial of the Case, Announced Law of:

At the trial of the case, over the objections of petitioner, the defendant Metropolitan Life Insurance Company, produced evidence which tended to show that a change had taken place in the health condition of the insured occurring after his application and before the issuance of the policy,

and that no notice of such changed health condition had been received by an agent of the company in charge of a local office at Astoria, Oregon.

To meet this issue petitioner offered evidence that both she and the insured had seasonably and at and prior to the payment of the premium on the policy, namely, March 19, 1924, fully informed and given notice of the changed health condition of the insured, to an agent of the defendant, appointed by it pursuant to the laws of the State of Oregon, being Section 2426, Oregon Laws, hereinafter set forth, and the one who solicited the policy, and to whom the application was delivered, the premium paid, and who delivered to the insured the policy in question.

The trial court held, announced and determined the law of the case to be as follows:

PROPOSITION OF LAW NO. 1. That although both by the plain terms of the written policy, and the plain terms of the law of Oregon, it is stipulated that the policy contains all the terms of the contract of insurance between the insured and assured, and this policy clearly specifies 'That the company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered by the company **during the life of the applicant**," and that "This policy shall not take effect unless or until the full premium has actually been paid in cash," nevertheless the court, added the further stipulation to the policy, "provided that at the delivery of the policy the applicant should be in good health," and upon this rule the trial court admit-

ted evidence showing the changed health condition of the insured occuring between the date of the application and delivery of the policy.

PROPOSITION OF LAW NO. II. The trial court further held, announced and determined that there was evidence produced at the trial, by the defendant, that a changed health condition had occurred to the insured, between the date of the application and delivery of the policy, and that it was the law of the case, that the burden of proof was upon the petitioner, to produce evidence showing that actual notice had been given the assured of such changed health conditions, prior to the delivery of the policy.

PROPOSITION OF LAW NO. III. The trial court, further held, announced and determined it to be the law of the case, that notice of such changed health condition, given to an agent of the insurance company, appointed under the laws of the State of Oregon, was not notice to the company. This question has been certified to and is now before this Court.

PROPOSITION OF LAW NO. IV. The trial court further announced, held and determined that the law of the case was against petitioner, and accordingly instructed the jury to return a verdict in favor of the Insurance Company.

The theory upon which this case was decided by the trial court is set forth in the opinion of his honor, R. S. Bean, trial judge, shown on pages 54 to 60, both inclusive, and pages 111 and 113 inclusive, certified copy of record.

It is an admitted fact in this case that the insured at the time of his application for and delivery to him of the life policy in question was a citizen and resident of Oregon. His application for the policy was made and delivered to Julien Coblentz, an Oregon agent of the assured in Oregon. The policy was delivered to the insured by the same agent to whom the premium was paid, all in Oregon.

The laws of Oregon in force at such times, relating to life insurance policies and life insurance companies, such as this one here, in so far as applicable herein, may be found in Title XXVI Oregon Laws, being part of Chapter 203, General Laws of Oregon, A.D. 1917, and read as follows:

> "**Section 6421. Life Insurance Companies Defined.** All corporations, associations, partnerships, or individuals, doing business in this state under any charter, compact, agreement, or statute of this or any other state, involving the payment of money or other things of value to families or representatives of policy or certificate holders, or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities, shall be deemed to be life insurance companies and shall be subject to this act, except as otherwise provided in this act."

> "**Section 6422.** Such life insurance companies shall not make any such insurance, guarantee, contract, or pledge in this state, or to or with any resident or citizen thereof, which does not definitely state the amount of benefits payable, the manner of payment and the consideration therefor. When the actual

premium charged hereafter for an insurance by any life insurance company or association doing business in this state is less than the net premium for such insurance computed according to the table of mortality and rate of interest prescribed in this act, such company shall be charged as a separate liability with the value of an annuity, the amount of which shall equal the difference between such premiums, and the term of which in years shall equal the number of future annual premiums due on such insurance at the date of valuation. **No such life insurance contract or policy may be issued which does not include all conditions and provisions relating to the contract."**

"**Section 6425. Agents.** 1. AGENTS' LICENSES. Every life insurance company doing business in this state shall give written notice to the insurance commissioner of the name and residence of, and obtain from him a license for every person appointed by it to act as its agent within this state, which license shall state, in substance, that the company is authorized to do business in this state and that the person named therein is constituted an agent of the company for the transaction of business in this state. Such license, unless revoked by the commissioner for cause or canceled at the request of the company employing the holder thereof, shall continue in force until the first day of April next after its issuance, and must be renewed annually, in advance.

(2) AGENT TO FILE APPLICATION. On receipt of an application for, and before issuing such license, the commissioner shall satisfy himself that such person appointed as an agent is qualified for the business he proposes to transact and such person shall have filed the applicant's statement provided in

section 6333. No person may solicit, place or procure insurance as an agent or solicitor until he has been provided with a license as required herein. No such licensed agent shall compensate or offer to compensate in any manner, directly or indirectly, any person, other than a licensed agent, for procuring or in any manner helping to procure an application or applications for insurance.

(3) TRANSFER OF LICENSE. Any license so issued may be transferred by the insurance commissioner upon the proper application of the company obtaining same without the payment of further fees, and he shall revoke any agent's license upon the written request of any such company or for failure to comply with the provisions of this act.

(4) REVOCATION OF LICENSE. Cause for the revocation of the license of an agent may exist for violation of the insurance laws, or if it shall appear to the commissioner upon evidence submitted or due proof after ten days' notice that such agent has, knowingly, deceived or defrauded a policy-holder or person being solicited for insurance, or that such agent has after written demand failed or neglected to pay over to the company or its agent entitled thereto any premium or part thereof collected by him on any application for or on any policy of life insurance.

(5) AGENT MAY PLACE REJECTED RISK IN OTHER COMPANY. An agent licensed on request of any company doing business in this state shall be entitled to place excess or rejected risks in any other company doing business in this state by and with the knowledge and approval of his own company without additional or separate license."

"Section 6426. Standard Policy Form.

(1) STANDARD PROVISIONS REQUIRED. From and after the first day of January next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions:

(c) A provision **that the policy shall constitute the entire contract between the parties,** and shall be incontestable not later than two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

"Section 6429. POLICY FORMS TO BE FILED WITH COMMISSIONER. A policy of life insurance shall not be issued or delivered in this state until the form of the same has been filed with the insurance commissioner nor if the insurance commissioner give written notice within thirty days of such filing to the company proposing to issue it showing wherein the form of such policy does not comply with the requirements of the laws of this state."

"**Section 6435.** Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

"**Section 6355.** Whenever any suit or action is brought in any courts of this state upon any policy of insurance of any kind or nature whatsoever, the plaintiff, in addition to the amount which he may recover, shall also be allowed and shall recover as part of said judgment such sum as the court or jury may adjudge to be reasonable as attorney's fees in said suit or action; provided, that settlement is not made within eight months from date proof of loss is filed with the company; provided, further, that if a tender be made by a defendant in any such suit or action and the plaintiff's recovery shall not exceed the amount thereof, then no sum shall be recoverable as attorney's fees. The terms of this act shall not apply to any suit or action started or begun prior to the passage of this act."

Upon this statement of the facts and record in this case, petitioner submits the following reasons why the entire record of the court below should be certified to this court pursuant to the provisions of Section 239 of the Judicial Code and Rule 34 of the Special Rules of this Court, so that this Court may consider and determine all legal questions in controversy in this case, namely:

FIRST: That the policy in question, by its plain terms, and also by the laws of Oregon, pro-

vides that it contains all of the terms, conditions and provisions relating to the contract of insurance.

That there is no provision of condition of the policy that required the insured to notify the Insurance Company of any change in his health condition occurring between the date of his application and delivery of the policy. That had the Insurance Company desired to have incorporated in such policy any such condition, it had the opportunity to insert it before delivery. Having failed to do this it can not be permitted to insert such a provision now. That the insertion of such a provision is violative of the plain terms of the wording of the policy, and the plain provisions of the laws of Oregon, and makes an entirely new contract between the parties, and one which in all probability the insured would not have accepted. That the true construction of the policy in question is to be determined by the statutory law of Oregon read with the policy, namely: Section 6422 and Section 6426, Oregon Laws, where it plainly appears to be the legislative intent to prohibit the defeat of a life policy, on the very grounds under consideration.

SECOND: That the Legislative Assembly of Oregon, by the provisions of said Sections 6422 and 6426, having specifically required that all the terms and conditions relating to the policy must be included therein, and that the policy shall contain the entire contract between the parties, it was error of the court to admit evidence of any change in the condition of the health of the insured, occuring after the date of his application and before the delivery to him of the policy, for that

by so doing the terms of the policy were changed, and a new provision favorable to the assured was inserted. A provision not within the contemplation of the insured at the time of the contract. On the contrary, by the plain terms of the policy, it became effective upon payment of the first premium and delivery of the policy, **at any time during the lifetime of the insured.** The writer of the policy was careful not to add the further provision, **"during the good health of the insured,"** but now wants the courts to add this stipulation for it. And the court below erroneously inserted this provision at the trial.

And it would seem that the Circuit Court of Appeals is in accord with such erroneous view.

THIRD: It is the contention of petitioner that the fact, if a fact, that there occurred a change in the health condition of the insured, as contended for, and that without notice of such change, the Insurance Company delivered the policy; that this constituted a defense, and the burden was upon it to sustain such defense. But the trial court announced it as the law of the case that the burden of proof that notice of such changed health condition was given the Insurance Company rested upon the petitioner, and having failed to sustain such burden, the jury was instructed to return a verdict for defendant.

FOURTH: That the trial court was in error in instructing the jury to return a verdict in favor of the defendant, for the reason that according to the evidence produced petitioner was entitled to have had the case submitted to and passed upon by the jury.

FIFTH: The decisions of the District Courts, and also of the Circuit Court of Appeals where the "Propositions of Law No. I and No. II" above mentioned, have come before such courts, are wholly at variance, and irreconcilable. The Supreme Court of Oregon has not considered either of these legal propositions. The attention of petitioner has not been called to any case in this court where either of these propositions have been considered. This case is now before the Court on the "Proposition of Law No. III," and it is the contention of petitioner that it is important to the judiciary, as well as to the bar, that these vexed propositions should be considered and finally determined by this court. Not only that, the propositions of law now desired to be certified to this court are germane to the question certified here by the lower court, and the petitioner should in justice have the opinion of this court on each of these legal propositions.

The other proposition presented by this appeal, namely: Whether the evidence offered by petitioner of notice to the statutory agent of the Insurance Company was competent upon the record, has duly certified to, and is now before this Court. For this reason no further mention is made here on this legal proposition.

WHEREFORE, your petitioner respectfully prays that writ of certiorari may be issued out of and under the seal of this Court, or such rule may be made and entered by this Court in accordance with the usual custom and practice of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding and di-

recting such court to certify and send to this Court the entire record in this cause in accordance with the provisions of Section 239 of the Judicial Code and Rule 34 of the Revised Rules of this Court, to the end that the whole matter in controversy may be considered and decided by this Court; and that your petitioner may have such other and further relief and remedy in the premises as this Court may deem appropriate and in conformity with the said provisions of the Judicial Code, and that the judgment of the District Court of the United States for the District of Oregon involved in this case be reversed.

JOSEPHINE STIPCICH,
Petitioner,

G.C. FULTON
Attorney for Petitioner

By G. C. FULTON
Her Attorney.

UNITED STATES OF AMERICA)
) ss.
District of Oregon)

G. C. Fulton being duly sworn, says: That he is attorney for the petitioner, and that the petitioner is now without the State of Oregon, and for that reason unable to make this verification.

That I have personal knowledge of the matters and things set forth in the foregoing petition and application, having been attorney for the petitioner at the trial of the above entitled case. That I have personally prepared the foregoing petition and application, and know the contents thereof, and the same is true as I verily believe.

G. C. FULTON.

Subscribed and sworn to before me this 28th day of August, A. D. 1926.

A. C. FULTON
Notary Public for Oregon

My commission expires

I hereby certify that I have examined the foregoing petition and application, and in my opinion the petition is well founded and the case is one which the prayer of the petitioner should be granted.

G. C. FULTON
Attorney for Petitioner

MEMORANDA

This is not intended to be a brief accompanying the petition and application, allowed by the rules of this Court, the object being to show to this Court the rule adopted and decided by the trial court, and apparently approved by the Circuit Court of Appeals, is wholly at variance, and in total disregard to the prior decisions of this court, and prior decisions of the court below.

In support of this contention we cite:

Mutual Benefit, etc., Co., v. Higginbotham, 95 U. S. 380, 24 L. Ed. 499.

New York Life Ins. Co. v. Moats, 207 Fed. 493.

Respectfully submitted,

G. C. FULTON,
Attorney for Petitioner.

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FILED
JAN 24 1927
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 97

JOSEPHINE STIPCICH,
Plaintiff and Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Defendant and Respondent.

BRIEF FOR PLAINTIFF AND PETITIONER JOSEPHINE STIPCICH UPON THE QUESTION AND PROPOSITION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

(UNDER SUBDIVISION 3, RULE 34, OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.)

G. C. FULTON, Astoria, Oregon, Attorney for Plaintiff and Petitioner.

WOOD, MONTAGUE & MATTHIESSEN, Portland, Oregon, Attorneys for Defendant and Respondent.

Filed this.....day of.....A. D. 1927

.....
Clerk.

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No. 533

Supreme Court of the United States

OCTOBER TERM, 1926

JOSEPHINE STIPCICH,

Plaintiff and Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Defendant and Respondent.

BRIEF FOR PLAINTIFF AND PETITIONER JOSEPHINE STIPCICH UPON THE QUESTION AND PROPOSITION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

(UNDER SUBDIVISION 3, RULE 34, OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES)

The United States Circuit Court of Appeals for the Ninth Circuit has certified to this Court the following question and proposition of law concerning which it desires instruction for the proper decision of this case, which is now pending before it, on Writ of Error to the United States District Court for Oregon, namely:

"United States Circuit Court of Appeals for the Ninth Circuit.

No. 4764.

JOSEPHINE STIPCICH,

Plaintiff in Error

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Defendant in Error

CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT CERTIFYING A CERTAIN QUESTION OR PROPOSITION OF LAW TO THE SUPREME COURT OF THE UNITED STATES UNDER SECTION 239 OF THE JUDICIAL CODE.

Before GILBERT, HUNT and RUDKIN, Circuit Judges.

This was an action on a policy of insurance on the life of one Anton Stipcich, loss, if any, payable to his wife.

On February 17, 1924, the insured made application in writing to the Metropolitan Life Insurance Company for a policy of insurance on his life. The written application signed by the applicant was divided into two parts, designated as parts A and B, and contained the following provisions, among others:

'IT IS UNDERSTOOD AND AGREED

'1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued.

'2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company; (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder.

'3. That any statement made to or by, or any knowledge on the part of, any agent medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application.

4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant.'

The policy was issued pursuant to this written application on March 26, 1924.

Sections 6426 and 6435 of the Laws of Oregon, provide:

> 'Section 6426. (1) Standard Provisions Required. From and after the first day of January next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions:
>
> * * *
>
> '(c) A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non payment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued.'
>
> 'Section 6435. Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in conse-

quence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever.'

In his application for insurance, the applicant stated that he had been operated on for a duodenal ulcer in January, 1922, but had recovered therefrom. On the day of the application and before the application was made he consulted a physician at Astoria, Oregon, for some stomach trouble and was given a prescription. This fact was not disclosed in the application. A few days later he again consulted the same physician and was advised that an X-ray should be taken. On March 7 or 8, he consulted a physician in Portland, Oregon, and was sent to the hospital for observation where he remained for several days. During that period the physician made a careful examination and diagnosis of his condition and informed him that in his opinion he had a duodenal ulcer and advised surgical interference. About March 20, he consulted and was examined by a third physician at Portland, Oregon, with the like result, and the same advice was given.

All this occurred before the policy of insurance was issued or delivered. Soon thereafter an operation was performed, as recommended, and the insured died as a result of the operation. It appeared, without contradiction, from the testimony introduced at the trial that between the date of the application for the insurance and the date of the issuance and delivery of the policy there was such a change in the health or condition of the insured as would

materially increase the risk or hazard, and that no notice of this change of health or condition and increase of risk or hazard was given or brought home to the insurance company prior to the issuance and delivery of the policy, but while the widow of the insured was on the stand as a witness on the trial in the court below the following offer of proof was made in her behalf:

> "That if the witness were permitted to answer the questions propounded and such questions as would properly bring this matter out, she would testify as follows: That after her husband, Anton Stipcich, had been examined and the X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time Mr. Julien Coblentz was agent for the defendant company."

That Julien Coblentz referred to in the above offer of proof was the agent of the Metropolitan Life Insurance Company who solicited and procured the application for the insurance, and the Dr. Sommer therein referred to was one of the doctors consulted by the insured at Portland, Oregon. The Court below sustained an objection to this offer of proof and an exception was duly taken and allowed. At the close of the testimony the Court directed a verdict in favor of the defendant.

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is:

Was it competent to prove by parol testimony that the agent who solicited and procured the application for the insurance in behalf of the insurance company was informed and had notice of the change in the health and condition of the insured and of the increase in the risk and hazard after the written application for the policy was made and before the policy was issued and delivered, as set forth in the above offer of proof, for the purpose of establishing a waiver or creating an estoppel, in view of the stipulation contained in the application for the insurance and more especially of the stipulation:

> "That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either Part A or B of this application."

WM B GILBERT,
WILLIAM H HUNT,
FRANK H RUDKIN,
United States Circuit Judges."

ARGUMENT

To properly answer this question, at least as we understand it, this Court should be fully advised.

FIRST: As to the statutory laws of Oregon pertaining to and governing life insurance companies and policies of insurance obtained and issued by such companies under such statutes existing at the issuance of the life policy in question.

SECOND: The provisions of the policy issued on the life of Anton Stipcich applicable to the question certified to this Court.

THIRD: The issues presented by the pleadings, and evidence produced by defendant, to which the offered but rejected testimony of Josephine Stipcich was responsive.

FOURTH: The law of the case.

I.

THE STATUTORY LAWS OF OREGON

The statutory laws of Oregon relating to life insurance companies and life insurance is found in Volume 2, Oregon Laws, under Title XXXVI, Chapter I. Copies of the particular statutory provisions which it is believed applicable to and necessary for the solution of the question propounded, and which were in force at the time of the application for and issuance of the life policy in question, are as follows:

"Sec. 6421. LIFE INSURANCE COMPANIES DEFINED. All corporations, associations, partnerships, or individuals, doing

business in this state under any charter, compact, agreement, or statute of this or any other state, involving the payment of money or other things of value to families or representatives of policy or certificate holders, or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities, shall be deemed to be life insurance companies and shall be subject to this act, except as otherwise provided in this act."

"Sec. 6422. LIFE INSURANCE CONTRACTS DEFINED. Such life insurance companies shall not make any such insurance, guarantee, contract or pledge in this state, or to or with any resident or citizen thereof, which does not definitely state the amount of benefits payable, the manner of payment and the consideration therefor. When the actual premium charged hereafter for an insurance by any life insurance company or association doing business in this state is less than the net premium for such insurance computed according to the table of mortality and rate of interest prescribed in this act, such company shall be charged as a separate liability with the value of an annuity, the amount of which shall equal the difference between such premiums, and the term of which in years shall equal the number of future annual premiums due on such insurance at the date of valuation. No such life insurance contract or policy may be issued which does not

include all conditions and provisions relating to the contract."

"Sec. 6425. AGENTS. (1) AGENTS' LICENSES. Every life insurance company doing business in this state shall give written notice to the insurance commissioner of the name and residence of, and obtain from him a license for every person appointed by it to act as its agent within this state, which license shall state, in substance, that the company is authorized to do business in this state and that the person named therein is constituted an agent of the company for the transaction of business in this state. Such license, unless revoked by the commissioner for cause or cancelled at the request of the company employing the holder thereof, shall continue in force until the first day of April next after its issuance, and must be renewed annually, in advance.

(2) AGENTS TO FILE APPLICATION. On receipt of an application for, and before issuing such license, the commissioner shall satisfy himself that such person appointed as an agent is qualified for the business he proposes to transact and such person shall have filed the applicant's statement provided in Section 6424. No person may solicit, place or procure insurance as an agent or solicitor until he has been provided with a license as required herein. No such licensed agent shall compensate or offer to compensate in any manner, directly or indirectly, any person, other than a licensed agent, for procuring or in any manner helping to procure an application or applications for insurance.

"Sec. 6333 * * * (5) CONTENTS OF APPLICATION FOR LICENSE. No license shall be issued to any applicant for an agent's license until such applicant shall have first made and filed in the commissioner's office an application therefor upon a form to be prescribed and furnished by the commissioner, which must show the applicant's name, business and residence address, name of company or companies to be represented, present occupation, occupation for last twelve months, portion of time to be devoted to the work, previous insurance experience, the name of employers during five years next preceding, and such other information as the commissioner may require. The statements and answers made in the application shall be warranted by the applicant and shall have the same force and effect as if such statements and answers had been made by the applicant as a sworn witness testifying to matters material to the issue in an action duly pending in a court of competent jurisdiction in this state. Such application must be approved by the company to be so represented and by the insurance commissioner."

"Sec. 6426. STANDARD POLICY FORM. (1) Standard Provisions Required. From and after the first day of January next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of

this state, unless the same shall contain in substance the following provisions:

(a) **PREMIUMS PAYABLE.** A provision that all premiums after the first shall be payable in advance, either at the home office of the company or to an agent of the company, upon delivery of a receipt signed by one or more of the officers who shall be designated in the policy. * * *

(c) **POLICY AND APPLICATION ARE CONTRACT.** A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued. * * * "

"Sec. 6429. **POLICY FORMS TO BE FILED WITH COMMISSIONER.** A policy of life insurance shall not be issued or delivered in this state until the form of the same has been filed with the insurance commissioner, nor if the insurance commissioner give written notice within thirty days of such filing, to the company proposing to issue it showing where-

in the form of such policy does not comply with the requirements of the laws of this state."

"Sec. 6435. **WHEN SOLICITOR AGENT OF COMPANY.** Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

II.

A full copy of the life policy in question, including a copy of the application of the insured, which was attached to and formed a part of the policy, is to be found in the printed Transcript of Record filed herein, beginning on page 8 thereof. The parts which it is believed applicable to the proper solution of the question certified are the following:

Page 8, Trans. of Rec.

"**METROPOLITAN LIFE INSURANCE COMPANY** * * * in **CONSIDERATION** of the application for this policy, copy of which application is attached hereto and made a part hereof, and of the payment of the annual premium of Two Hundred and Twelve Dollars and Forty-eight Cents, and of the payment of a like amount upon each 26th day of March hereafter, until twenty full years' premiums shall have been paid or until the prior death of the insured,

Promises to pay at the home office of the company in the city of New York to

ANTON STIPCICH
(herein called the Insured)

on the 26th day of March, 1944, if the insured be then living, or upon receipt at said home office of due proof of the prior death of the insured, to Josephine Stipcich, wife of the insured, beneficiary, Four Thousand Dollars, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy year, upon surrender of this policy, properly receipted."

NOTE: It is there clearly and positively stated that the sole and only consideration for the issuance of this contract by the company is—

(1) The written application of the insured; and

(2) The payment by the insured to it of the specified premiums.

There is no provision to be found in the policy making it a condition that the insured should be in good health at the time of delivery. On the contrary, it is plainly stated that the company relied solely upon the written application of the insured as to his health condition. Furthermore, no provision as to notice of anything or matter to the company, excepting of the death of the insured is to be found in this policy.

On page 28, Transcript of Record, is found the following stipulation incorporated in the application of

the insured, which is made a part of the policy, namely:

> "IT IS UNDERSTOOD AND AGREED:
>
> 1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued. * * *
>
> 4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant."

Nothing here is found requiring the insured to be in good health at the delivery to him of the life policy, or requiring notice of any change in the insured's health condition. All that is required of the insured is, that he shall be alive at the delivery of the policy. As to his health condition, the assured assumes that risk.

POLICY CONTAINS ALL THE TERMS OF THE CONTRACT BETWEEN THE PARTIES

On page 12 of the Transcript of Record is found the further provision of this policy, namely:

> "3. INCONTESTABILITY. This Policy (and the application therefor) constitutes the entire contract between the parties, and except for non-payment of premiums, shall be incon-

testable after two years from the date of its issue.

All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statements shall avoid this Policy or be used in defense of a claim hereunder, unless it is contained in the written application therefor and a copy of such application is securely attached to this Policy when issued."

See also Sec. 6425, Sub. (c) O. L.

Nothing here is required of the insured to give notice to the assured of any change in his physical health occurring after the application and before delivery of the policy. Nothing which can be construed into any agreement that the or any of the statements of the applicant shall be held to be continuing statements until delivery of the policy. On the contrary, it is plainly stipulated to the contrary. Not only that, but it clearly provides, that no representation or statement other than those included in the application can be employed to defeat the policy. Such, too, is the law of Oregon.

Such are, as we understand it, the main provisions of the contract of insurance applicable to the solution of the question propounded to this Court.

III

ISSUES PRESENTED BY THE ANSWER

For the purpose of determining the materiality of the offered testimony, it is of importance to consider the special answer of the defendant.

As a special defense to the recovery on the policy, the defendant averred—

> (1) That after his application for the insurance, and prior to the actual delivery to him of the policy, a material change took place in the insured's health, which materially increased the risk intended to be assumed by defendant in its policy.
>
> (2) This change of health, the insured purposely and fraudulently concealed from defendant.
>
> (3) That it had no knowledge of such changed conditions, and had no means of knowledge thereof.
>
> (4) That had the assured known of such change, it would not have issued the policy.

It was in response to such issues and evidence produced by the defendant in support thereof that the plaintiff offered to produce the evidence rejected, as set forth in the question propounded to this Court.

The plaintiff seasonably challenged the legal sufficiency of this defense, but it was held good by the trial Court, and over her objection, defendant produced evidence which tended to support such defense. The theory upon which this special defense was sustained, and evidence admitted in support thereof, was this, namely: That despite the plain wording of the policy, and the statutory provisions of Oregon above quoted, and, as we view it,

in direct violation thereof, there is an implied obligation construed into this policy, on the part of the insured to have notified the assured of any material change in his health condition occurring between the application and the delivery of the policy, or to express it otherwise, that, although not so expressed in the policy, there is an implied warranty on the part of the insured that his health condition would continue and be the same as represented in the application until the policy was delivered. If any such change did occur, and no notice thereof was given the assured, the policy could be avoided on such ground.

To meet the issue produced by this special plea, and the evidence produced by defendant in support thereof, plaintiff in rebuttal, at all times relying upon the case of MUTUAL BENEFIT LIFE INS. CO. vs. HIGGINBOTHAM, 95 U. S. 380, 24 L. ed. 499, offered evidence to the effect that immediately prior to the payment of the premium and delivery of the policy, the insured fully and truthfully informed the defendant, through its agent Julien Coblentz, of the changed condition of his health, as disclosed by the proof produced on behalf of defendant. This evidence was rejected upon the theory that such notice to Coblentz, although intended to be to the defendant, and was given for such purpose, was not notice to the defendant, and this is the ultimate question to be decided by this Court in this case.

It is, therefore, important that this Court should determine the power and authority of this agent.

AGENCY OF JULIEN COBLENTZ

There can be no controversy as to the fact or character of the agency of Julien Coblentz for defendant. The record shows—

(1) He was the duly licensed agent of defendant under the laws of Oregon, Sec. 6425, O. L.

(2) He was the agent of defendant who solicited and procured the application of Anton Stipcich for the policy in question. See Sec. 6435, O. L.

(3) He was the agent of defendant to whom the insured paid the first full premium.

(4) He was the agent who delivered the policy to the insured.

(5) Mr. Julien Coblentz was the only agent of defendant who actually signed the official voucher acknowledging receipt of the first full premium on the policy. (See page 38, Tr. of Rec.)

All business transactions had between the insured and the defendant from the application to and inclusive of the delivery to him of his policy were done exclusively through Julien Coblentz. As we have mentioned, the statutory laws of Oregon at that time provided that any person who shall solicit and procure an application for life insurance shall, **in all matters** relating to such application and the policy issued in consequence thereof, be regarded as the agent of the insurer, not a special agent with limited powers, but a general agent relating to all

such matters. (Sec. 6435, O. L.). He was the licensed agent of defendant under the laws of Oregon. (Sec. 6425, O. L.), which further provided, that every life insurance company doing business in such state must give notice to the Insurance Commissioner of the name and residence of, and obtain a license for, every person appointed by it to act as agent for it within the state, which license shall state in substance that the person named therein **is constituted an agent of the company for the transaction of business in the state**, not a special or an agent of limited authority, but an agent of the company to transact business in the state. What business may we inquire? There is but one answer, namely, to procure applications for insurance, collect the first premiums and deliver the policies. All these things Julien Coblentz did for the insured, and let it be known, that all the matters under investigation here, and the evidence relating thereto, which was rejected, had reference solely to the period beginning with the application and ending with the delivery of the policy. The insured knew no other agent or representative of defendant. The insured found Julien Coblentz's signature on the first official receipt delivered to him as evidence of payment of the first premium (pg. 38, Transcript of Record), and it was to Julien Coblentz that he and his wife, the beneficiary named in his life policy, fully, frankly, honestly and in all good faith, long after the application for the policy was signed and delivered to defendant, and immediately prior to the payment of the first premium and delivery of the policy, communicated to defendant, through Coblentz, the fact of his physical condition complained of by defendant. The insured and his beneficiary

were wholly frank and honest with defendant. No fraud, deceit or misrepresentation can be charged against either. They did all that either honestly believed they could or should do. They put defendant in full possession of the health condition of the applicant. What other information the insured gave defendant, if any, or through what channel such information was conveyed, can never be established in the courts of this land. Such information, if any, was lost at the death of the insured. Mutual Benefit Life Ins. Co. vs. Higginbotham, supra. If notice to defendant of the changed condition of the health condition of the insured complained of was an obligation constituting a warranty on the part of the insured, surely notice to it, through Coblentz, was sufficient. If not, to whom, and by what manner or method should such notice be given? There is no provision of the policy requiring such notice, nor is there any provision providing the method or manner of such notice, or to whom it should be given. Ample and specific provision is made in the policy as to notice of and proof of death of the insured. Why no provision for notice of changed condition of health? The policy specifically provides, likewise the Laws of Oregon, that the policy contains all the terms of the contract between the parties. In fact, Section 6422, Oregon Laws, provides that "no such life insurance contract or policy may be issued which does not include all conditions and provisions relating to the contract." Yet no provision can be found in the policy, either requiring any such notice, or providing to whom such notice may be given, or the sufficiency or method or manner of such notice. Under these stipulations and statutory provisions, the insured hunted

and found Julien Coblentz, who solicited and procured from him the application for this policy, and delivered to him the policy, and to whom he subsequently paid the premiums, and truthfully informed him of his changed physical condition, to which the special defense and evidence produced by defendant referred.

Our contention is, that if this contractual obligation shall be construed into this policy of insurance, this notice given Coblentz was surely sufficient, and that defendant cannot, in the absence of any stipulation in the policy, interpose its contention that the notice should have been given to some other agent of defendant, whose home office was without the State of Oregon.

That whilst, as a matter of fact, we contend that failure to give notice of any changed condition of the health of the insured can not be used or employed to defeat the claim, nevertheless, it is manifest that the cause was tried in the trial Court, over the objection of plaintiff, upon the theory that the notice contended for by the defendant must have been given defendant. It is not now available to defendant to contend that the evidence offered and rejected was immaterial.

As we understand it, such is the rule in Mutual Benefit Life Ins. Co. vs. Higginbotham, 95 U. S. 380, *supra*.

IV.

It is our contention that the construction into the policy of insurance of a provision to the effect that it was the duty of the insured to notify the company

of any material change in his health condition which increased the risk to be assumed by the company, after he had delivered his application and before delivery of the policy, must be held to be contractual, and in plain violation of the stipulation in the policy, and the statutory provisions of the Oregon Laws. Section 6422 and 6426, Oregon Laws, supra. The policy contains no such stipulation or obligation. The only provisions of the policy in anywise relating to such construction are—

(a) Payment in full of the first premium.

(b) Delivery of policy during the life time of the insured.

All these provisions were fully performed.

We appreciate the fact that although the legal question as to whether this Court will construe into this policy, in the face of the plain terms of the policy and the statutory provisions of this state prohibiting it, a stipulation requiring the insured to give the insurer such notice of any such changed conditions of his health, is not in so many words certified to this Court, nevertheless, it is a question that must be considered and determined by this Court before an answer can be properly made to the question submitted, for it is clear that if such notice must be given, there must be an additional contract provision added to the policy providing therefor, and also providing **to whom such notice must be given**, and the further provision whether verbal or in writing. None of these provisions are in the policy. In order to get them there, they must of necessity be construed into this Policy by this Court. In order to do

this, this Court must of necessity give this question its full consideration. There seems no other course open.

V.

THE CONSIDERATION FOR THE POLICY

The assured prepared this contract. It is therein specifically agreed that the sole and only consideration for the contract moving to the assured is, (pg. 8, Transcript of Record) (1) the application for the policy, and (2) payment of the first and thereafter annual premiums, and (3) (pg. 38, Transcript of Record), that the policy shall become in full force and effect upon the application being received, approved and policy issued and delivered, and the full first premium stipulated in the policy has actually been paid and accepted by the company, **during the life time of the applicant,** and that all of the conditions and provisions relating to the contract of insurance are included in the policy, and that the policy itself constitutes the entire contract between the parties.

The application for the policy was duly received and accepted by defendant. The first premium was paid in full to and received by the assured. The policy was issued and delivered to and received by the applicant during his life time. The insured, in all honesty and good faith, performed all the terms and conditions of the policy. Not only that, he did more than he was required to do. Before the policy was issued to him and before he had paid the first premium, he discovered that he probably was suffering from a recurring ulcer of the stomach, which probably required a surgical operation. This infor-

mation he promptly gave the assured before he paid his premium. With all this knowledge, the assured accepted the premium, issued to the insured the policy. Thereafter, the surgical operation was deemed advisable and performed, from which the insured died. His widow, the beneficiary named in the policy, brought this action on the policy. But her claim was denied, solely by reason of a contractual obligation construed into the policy, in plain violation of the express terms thereof and of the laws of Oregon, a policy provision that the statements made by the insured in his application, of date February 17, 1924, were continuing warranties up to the delivery of the policy, March 26th following. Such is not the rule of this Court. In fact, the rule is plainly to the contrary. We refer to the case of Mutual Benefit Life Ins. Co. vs. Higginbotham, 95 U. S. 380, 24 L. ed. 499, supra, where this Court, after a full consideration of the law of the case, held, that a statement by the insured made October 1st for a renewal of his policy, should not be held a continuing representation up to October 14th, the date of the delivery of the certificate of renewal. This Court there held that had the insurance company desired further information as to the condition of the insured's health, at date of delivery of the certificate of renewal, it should have then made it. Failing so to do, it was estopped from denying liability, because a material change had taken place in the physical health of the insured. We quote from the Court's opinion.

> "Had it been otherwise, we cannot conceive how the sagacious business men who control this Company would have assented to the de-

livery of the policy without inquiry as to the intermediate time. More than three months elapsed before Day's death, monthly returns being made by the agent; and the Company must have known and assented to the delivery of the renewal receipt not only, but to the fact that there had been no inquiry or information as to Day's health after October 1st. The jury might account for it on the theory that the whole contract was intended to be and was as of October first, and that it spoke from that date.

There is every indication that Day thus relied upon that contract, nor is there any reason to believe that he intended to deceive or to conceal. The Company made inquiries to its own satisfaction, so far, in such direction, upon such points, and within such periods as it thought proper. It was not for him to advise the Company of what it should do, or to volunteer information which it did not seek. He paid his money, delivered his certificate, received the renewal when the Company chose to give it, found upon examination that it covered the whole period from the July preceding. He lived in the same town with the agent, and received no suggestion from him that anything further was expected, and was warranted in assuming that his contract was intended to take effect from an earlier period than its actual delivery. He probably died in the honest belief that he had thus provided for his widow. It would be far from good faith to his representatives should it now be held otherwise."

It would seem that the doctrine of the above case is decisive of this question. We rely upon it, and shall cite no further authority.

STIPULATION IN THE APPLICATION

The Court below seemed to have been impressed with the idea that the following stipulation in the application, namely:

> "That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either Part A or B of this application."

should be construed to apply to statements made or knowledge obtained by the assured, after the delivery to it of such application. In this, we submit such Court is clearly in error. The application was signed and delivered to the company on February 17, 1924. The information to the Company of the changed condition of the insured's health was given the Company on March 24th or 25th following. It was impossible for the insured to have included this information in the application or in Parts A or B thereof.

Therefore, if this stipulation has any such application, the fact of actual notice to the company, the character of such notice, or to whom such notice was given, accompanied by even the most formal written aknowledgement of such notice by the company itself, would be a wholly immaterial matter, and unavailable to the insured, unless such state-

ment, or acknowledgement of such notice, should have been incorporated in such application, and in either Part A or B thereof,—a construction which we feel justified in saying this Court will not entertain at least long hesitate in so doing.

This stipulation should be construed with the following other stipulations in the policy, namely: (pg. 12, Trans. of Rec.)

> "3. INCONTESTABILITY.—This policy (and the application therefor) constitutes the entire contract between the parties, and except for non-payment of premiums, shall be incontestable after two years from the date of its issue.
>
> All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this Policy or be used in defense of a claim hereunder, unless it is contained in the written application therefor and a copy of such application is securely attached to this Policy when issued."

Also, with the laws of Oregon in this regard, particularly Section 6426, O. L. above quoted.

Plainly and clearly, it is stipulated in the policy, that no statement made by the assured can be used in defense of a claim under the policy, unless contained in the written application. How can it be held, in the face of these stipulations, that a claim under the policy can be defeated and the policy avoided, by a showing to the effect that the insured

remained silent, when he should have spoken, yet had he spoken, his statement could not be used to avoid the policy?

This stipulation must be taken and construed as a whole. It cannot be separated into distinct parts. It deals with but one subject, and limits the statements of the insured, notice by it received, knowledge by it obtained, and all information pertaining to the life history, and physical condition of the insured to statements made and information given and found exclusively in Parts A and B of the application, and its policy was based exclusively thereon.

If it does have any application, it must, as we have pointed out, be construed with Section 3 of the policy above quoted. Such being true, the failure to furnish the information complained of, not being in the application, or in Parts A or B, and no stipulation in there found requiring such information, the Company, by its own stipulation, cannot use or employ such failure as a defense to this action, or to avoid the policy.

As we construe this stipulation, it has naught to do with matters occurring subsequent to the application.

CONCLUSION.

It is our contention—

(1) That, under the plain provisions of the statutory laws of Oregon in force at the time of the transactions involved in this action, and the plain terms of the contract itself, the in-

sured was not obligated to give notice to the Company of any change in his health condition occurring after the delivery of his application and before delivery to him of the policy. That the Company, by the plain terms of the contract, reserved the right to make full investigation and inform itself fully as to the health condition of the applicant at and prior to the delivery of the policy. Mutual Benefit Life Ins. Co. v. Higginbotham, supra.

(2) That the trial court was in error in admitting the evidence produced by the defendant, tending to show a change had occurred in the health of the insured after the application and before the delivery of the policy, etc. That, nevertheless, such evidence being introduced upon the theory of defendant's case that the evidence offered and rejected became then material—at least, defendant cannot now contend that because under the policy the defense pleaded constituted no defense, and no evidence produced in support thereof, was immaterial, that the offered and rejected testimony became immaterial.

(3) Yet if it be held that the contract of insurance obligated the insured to give defendant such notice, that under the plain wording of the provisions of the statutory law of Oregon Sections 6425 and 6435, Oregon Laws, quoted supra Julien Coblentz was the general agent of defendant in all his dealings with the insured, and in all transactions occurring from the application for the policy up to and including

the delivery of the policy. Such an interpretation will be fair to both parties, if for no other reason than that no provision is made in the policy as to the method or manner of giving such notice, or to whom such notice should be given, and the further fact that such notice to agent Julien Coblentz was shown by the evidence to be given in all honesty and good faith.

Under such circumstances, all that should be required of the insured is that he should act in good faith and as an ordinary man should under like circumstances, which is always a question for the jury.

(4) That conceding for the purposes of this case that the statements made in the application shall be held to be continuing statements up to the completion of the contract, the stipulation quoted from the application for the insurance in the question propounded has no application, but applies solely to the application, and not to matters subsequent thereto. Hence, notice to Julien Coblentz was notice to the assured, and the answer to the question propounded should be Yes.

(5) That it is the law of this case that the answer to the question propounded should be Yes.

Respectfully submitted,

G. C. FULTON

Attorney for Petitioner Josephine Stipcich.

Office Supreme Court, U. S.
FILED
OCT 26 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 97

JOSEPHINE STIPCICH,

Plaintiff and Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Defendant and Respondent.

REPLY BRIEF ON BEHALF OF PLAINTIFF

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Filed this.....day of.....A. D. 1927.

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Clerk.

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Supreme Court of the United States

OCTOBER TERM, 1926

No. 533

JOSEPHINE STIPCICH,

Plaintiff and Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Defendant and Respondent.

REPLY BRIEF ON BEHALF OF PLAINTIFF

Counsel for defendant suggest four propositions in their brief in this case. We will take these propositions up in the order set forth in their brief.

FIRST

It is first contended that the authorities are unanimous that any change in the physical condition of the appellant pending the consideration of his application by the insurer and prior to the actual consummation of the contract by delivery of the policy and payment of the premium must be brought to the attention of the company. This proposition we deny.

(a) In the very nature of things, it cannot be true. It surely cannot be soberly denied that the insurer and insured may, by stipulation, provide when the policy shall take effect, or that representations and statements are to be considered only as representations, not warranties. It surely cannot be denied that the insured and insurer can by stipulation provide that the only condition required for the enforcement of the policy is the payment of the premium at any time during the life of the insured. It is, doubtless, true that in construing the wording of a special policy, some of the Courts have added a stipulation to the effect that any change occurring in the health of the insured between the application and the delivery of the policy must be brought to the attention of the insurer, but no case can be found where it is held, under statutory provisions such as are in force in Oregon, and under a writing such as we have here, that any stipulation not in the writing can be added to it, or that any written term or stipulation can be judicially eliminated therefrom. Every policy must be construed according to the express written terms thereof.

In this case, the defendant came into the State of Oregon in competition with many other life insurance companies. It made the terms of its policy as attractive as possible. It accepted the laws of such state. Its policy complied with the statutory provisions, which provide that the written terms of the policy are all the terms and stipulations thereof, and that nothing can be taken therefrom or added thereto.

(b) THE CONTRACT OF INSURANCE AND THE LAWS OF OREGON.

We insist that the question for solution presented by the Court of Appeals must be determined wholly from the written terms of the contract of insurance, construed with the insurance laws of Oregon.

1 Cooley, Briefs on the Law of Insurance, pg. 690

National Fire Ins. Co. v. Wanberg, 260 U. S. 71, 67 L. ed. 136.

Union Trust Co. v. Grosman, 245 U. S. 212, 62 L. ed. 368.

THE LAWS OF OREGON

Section 6422, Oregon Laws, pp 9, 10, plaintiff's brief, provides, "no such life insurance contract or policy may be issued which does not include all conditions and provisions relating to the contract."

NOTE: No reference is made to this statutory provision in the certificate from the court below. Doubtless, it was overlooked, but it should be considered, and is one of the important matters connected with the construction of the policy in question.

Section 6426, Oregon Laws, pg. 12, plaintiff's brief, provides, "that every policy of life insurance shall contain a provision that the policy shall constitute the entire contract between the parties; that all statements made by the insured

shall, in the absence of fraud, be deemed representations, and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy, unless contained in a written application, and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

There is a provision in the policy containing the same wording as the above mentioned statutory provision. The policy contains the further stipulation, namely: (pp 8, 9, Transcript of Record)

(1) The application for the policy, which is attached to and made a part of the contract of insurance, and, of course, should be read with all the other terms and conditions of the policy.

(2) The policy contains the further provision that the company shall incur no liability under the application until it has been received, approved and a policy issued and delivered, the **first premium stipulated in the policy actually paid to and accepted by the insurer, during the life of the applicant.**

There is no stipulation that the applicant should be in good health when the conditions precedent above cited had been complied with. There is no stipulation that the representations made in the application were continuing warranties. Nothing at all. All that the insurer required was the payment of the premium, and the delivery of the policy to the insured **during his life time.**

There is no stipulation requiring the insured to notify the insurer of any changed condition of his health occurring between the date of the application

for the policy and its actual delivery. If the contract of insurance as written "constituted the entire contract between the insurer and insured," and "includes all the conditions and provisions relating to the contract," how can it be held that this Court can write into this contract a stipulation which the insurer refused to write into it itself, namely, **that in addition to being alive at the delivery to him of the policy "the insured must also be in good health," or, "that if any change occurred in his health which should materially increase the risk assumed by the insurer under the policy, he should notify the insurer of such change, otherwise the policy should be ineffective," and these added conditions shall constitute warranties, not representations?**

It is our understanding that it was to prevent such court amendments that the legislature of Oregon enacted the statutory provisions above set forth. Surely, the insured had the right to assume that had the insurer desired it, such stipulations would have been written into the policy before its delivery, so that he could understand what the terms and conditions were. He had also the undoubted right to assume that such stipulations not having been written into the contract, neither formed any part thereof.

Section 713, Oregon Laws, reads as follows:

> "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in

interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties."

As we have heretofore noted, it is stipulated in the contract of insurance that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and that no statement can be urged as a defense to a claim under the policy, unless contained in the written application, etc.

It is fundamental that to defeat a life insurance policy upon the ground of false representations, the burden is upon the insurer to prove, (1) that the representation by it claimed to be false was in fact false, and further (2) that it was knowingly made with intent to deceive, and (3) that the insurer was thereby deceived, and issued the policy in reliance upon the truth of such representation.

Ley v. Metropolitan Life Ins. Co., 128 Ia. 203, 94 N. W. 568.

Askey v. New York Life Ins. Co., Wash., 1918 F. L. R. A. 267.

Had the defense to this action been that the insured had made a false statement in his application, it would have been incumbent upon the defendant to have proven, not only its falsity, but that it was knowingly so made with intent to deceive the insurer, and that the insurer was thereby deceived and issued the policy in reliance thereon. Of course, there was no such proof offered at the trial in the court below.

But, now the wrong of the thing is, that it is contended that the mere proof of the fact that between the signing and delivery of the application and the delivery of the policy, a change in the health of the insured is sufficient to absolutely defeat the policy. Not only that, but the contention is further made that this proof cannot be met with evidence on behalf of the plaintiff of absolute good faith on the part of the insured, namely, that the true state of the health of the insured was fully and honestly stated to the insurer at and prior to the delivery of the policy.

Why is it that all representations and statements of the insured contained in his written application are only representations whilst this proposed added stipulation is a warranty?

Had it been included in the written application, it could be held to be but a representation. At what period does it blossom into a warranty? The only answer is, when this Court adds it to the written contract of insurance.

As stated, the insurer had the right to include in this policy the stipulation, that, in addition to the insured being alive, he must be in good health. But, it did not do so, preferring to take its chances on any change of health, or its system of investigation. Its only stipulation being that the insured must be alive. Such was its stipulation. If any other conditions were desired, it was the duty of the insurer to include them in its contract, for, by the plain terms of its contract, it is positively stipulated that the written policy contains all the terms, stipulations and provisions between it and the insured.

We respectfully submit that this Court cannot, under any known theory of the law, make statements, which, by the terms of the policy, are only representations, unless made to defraud, into absolute warranties.

Under this head, the learned counsel for defendant cite and discuss many authorities, substantially having under consideration cases where the applicant had made false statements. As we have suggested, if the defense in this case had been that the insured had made a false statement, it would be incumbent upon the defense not only to prove its falsity, but it would be required to go further and prove that it was knowingly false, and intended to deceive the insurer, and the insurer was thereby deceived. This would permit the plaintiff to have shown the good faith and honesty of the insured, and that he exercised his best ability to give notice to the insurer, and that his actions were not knowingly wrong. These cases have no application.

But, supposing it be assumed, that some place, some where in this policy is to be found or imposed, as we may choose to name it, an obligation on the insured to notify the insurer of any change in his health occurring between the application and the delivery of the policy, it can only be upon the theory that the statements made by the insured in his application for the policy are continuing statements from the time the application was made until delivery of the policy. There is no other theory upon which any such obligation can be imposed upon the insured under this policy, and is the theory of some of the courts in their decisions cited by counsel for defendant. This must be true, and being true, such statements must be construed to be representations, and not warranties, in the absence of fraud. The trial Court held such statements to have been warranties. But, be that as it may, the plaintiff surely had the right to show good faith. She had the right to produce proof of good faith on the part of the insured for the consideration of the jury. This being true, she had the right to produce evidence that at the time the premium was paid and the policy delivered, the insured truthfully informed the insurer of this alleged change in his health. Upon this theory alone, the rejected evidence was competent, and should have been admitted. It was competent evidence to show good faith, and that the insured was not guilty of fraud. This was a question for the jury, not the Court.

SECOND

Counsel for defendant for their second proposition suggest, in a more or less involved statement,

that, even though the insured did inform the agent for defendant to whom he paid the premium, and who, on behalf of the defendant, delivered the policy to him, of the alleged changed condition of his health, that the knowledge so obtained by such agent would not be the knowledge of the defendant, so as to create an estoppel of waiver on the part of the defendant to make the defense pleaded.

This contention is based upon the following stipulation in the application, namely:

> "No statements or representations made or information given to a person soliciting or taking the application of the policy, shall be binding on the company or in any manner affect its rights unless they are reduced to writing and presented at the home office with the application."

That this stipulation had reference only to the statements in the application is too plain for argument, for it so plainly states. It is plainly stated that any such statements **therein referred** to must be in writing and presented to the home office **with the application.**

If this contention is not supported by this stipulation, it is manifest that the trial Court was clearly wrong in directing a verdict for defendant, for such Court based its ruling on this stipulation alone.

The defense in this case is not that any statement made by the insured was false; on the contrary, the defense is that he did not make any statement at all after the application had been delivered

to and was in the possession of the defendant, and before the policy was issued. Just how this could be delivered to the home office is somewhat difficult for us to conceive. There is no provision in this policy even suggesting any such information. In fact, plaintiff makes no claim of waiver.

We make no contention that any agent of the defendant had the power to or even attempted to waive any of the conditions of this policy, or that any provision of the policy was waived. It is our contention that the insured performed the provisions of the policy by him required to be done or performed. The position assumed by defendant is remarkable in the extreme. It is first contended that this Court should add to this contract of insurance certain stipulations, which the insurer did not choose to put into it in the first instance, and then to make the failure to perform such added stipulations **warranties** on the part of the insured, and an absolute defense to the payment of the sum due on such policy. On the other hand, it is insisted, with a firmness strange to behold, that the insured should be bound by every stipulation and provision therein contained. In other words, that as to the insured, he should be bound not only by the terms of the contract, but such additional terms pleasurable to the insurer. But, as to the insurer, it is contended that the contract should be modified so that it can escape the performance of its contract. To this we respectfully interpose our objections.

THIRD

It is next contended that Section 6435, Oregon Laws, should be held not applicable to the law of

this case. The theory upon which this contention is based, as we understand it, is not that it is violative of any of the constitutional provisions of the United States or of the State of Oregon, but that the power and authority of a corporation to define and limit the power of its agents is a matter of general jurisprudence, not a rule of property, and the Federal Courts will not enforce a statute which arbitrarily provides that corporations or parties engaged in writing life policies in Oregon must employ only certain licensed agents of good moral character, who shall at all times be the agent and representative of his principal in regard to its insurance business, although the state Court will enforce such laws.

This contention, as we understand it, is based upon the doctrine of Prudential Ins. Co. v. Moore, 231 U. S. 560; Hartford Fire Ins. Co. v. Nance, 12 Fed. (2nd) 575. In neither of these cases is found any such doctrine. In the Prudential Ins. Co. v. Moore case, it is held, if we understand it at all, that the question of good faith is a question for the jury and not for the Court. In that case, this Court plainly held, that the laws of the State of Georgia formed a part of the contract of insurance. In the Hartford Fire Ins. Co. case, the Court held, "the validity of a contract, of course, depends upon the applicable statutes and decisions of the state where the contract is made or to be performed . . . . It is also true that the Federal Courts in construing contracts will follow the state Courts where a statute or local rule of property is involved." The Court simply held that the contract in question was not to be determined by the laws of the State of Ohio, because it was not made there. The defend-

ant came into Oregon, and in plain terms accepted the provisions of the statutory laws of Oregon. It secured the appointment of its agents under the laws of the State of Oregon. It surely cannot be held that under such circumstances, it is not bound by such statutes. Besides, as we have suggested, the statute in question is surely constitutional. The defendant admitted, at least, as we understand it, this statute is enforcible in Oregon. If so, why not here? Furthermore, as we have stated, it is not our contention that this agent waived or modified any of the provisions of the contract. Our contention all along has been and is that Mr. Coblentz was the agent of the defendant, soliciting, procuring and delivering policies of insurance, and that he was the only man that the insured knew who represented the defendant, and that the insured, in good faith, notified him of his health condition.

FOURTH

The next contention suggested by counsel for defendant contains this statement:

> "The stipulations of the application to the effect that the knowledge of the agent shall not be the knowledge of the principal, and that the agent has no power to make, modify or discharge the contract of insurance, or to bind the company by making any promises respecting any benefits under the policy operated prospectively."

and, hence, it is argued that any notice of change of health of the insured to the party who solicited

and received the premium and who delivered the policy is not notice to the company.

Let us examine this provision of the policy. It reads:

> "That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company; (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued."

But, it cannot surely be contended that this provision of the policy has any application to the notice that the insured and his wife gave the Company.

The next provision of the policy reads:

> "3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application."

As we have heretofore pointed out, this certainly has no application whatever to the notice in question, for it is manifest, in fact, too plain for argument, that this provision of the policy applies only to the proceedings had before the application was received, not afterwards. It was not as to the matters occurring prior to the application that are involved here, but matters occurring after the ap-

plication had been delivered to and was in the possession of the insurer. There is nothing in the policy indicating to whom any notice should be given. There is nothing to the contrary found either in Hartford Fire Ins. Co. v. Jones, 15 Fed. (2nd) 1, or Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613. No such question is presented in either of these cases.

We do not contend that any knowledge acquired by the agent of the defendant who assisted the insured in making his application, or was present when the application was made, or acquired prior to the delivery of the application, is notice to the Company, for the simple reason that it is so stipulated in the policy. That is not the point here at all. We have heretofore in this brief and in our original brief filed in this Court discussed the phase of the case under this head.

In conclusion, we repeat that from any viewpoint the evidence offered and rejected was competent, (1) as actual notice to the insurer of the changed condition of the insured's health, and (2) that it was competent for the purpose of showing good faith, and to prove that the insured was not guilty of fraud.

Respectfully submitted,

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